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**THE HEARING EXAMINER OF THE CITY OF BELLINGHAM
FOR WHATCOM COUNTY, WASHINGTON**

IN RE:

NO. HE-19 PL-009

JAMIE K. DONALDSON, Appellant

**Appellant Jamie Donaldson's Pre-
Hearing Brief**

Appeal of CAP 2018-0059- 20 Shorewood
Drive

INTRODUCTION

This appeal concerns the survival of the Post Point Heron Colony. Whatcom and Skagit Counties once supported two of the largest Heron colonies in the Salish Sea: Samish Island and Point Roberts. Both are now gone. And human disturbance is to blame.

The Post Point Rookery has expanded recently, most likely with nesting pairs from these other abandoned colonies. Under BMC 16.55.200(A)(5), any development in or near the Colony must "protect the critical area functions and values consistent with the best available science and result in no net loss of critical area functions and values."

1 Here, the proposed residential development will degrade the buffer around the Heron
2 Colony, reduce its size, and disturb the Rookery with ongoing human intrusion. The
3 proposed subdivision threatens the critical area functions and directly contradicts the
4 values of protecting Great Blue Herons and their surrounding habitat.

5 Because the City granted the critical areas permit in error and in violation of the
6 City's legal obligations, Appellant Jamie Donaldson respectfully requests the Hearing
7 Examiner to reverse the City's decision and deny the permit.

8 **I. Issues Presented**

9 Ms. Donaldson's appeal presents three issues for the Hearing Examiner to
10 decide:

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12 A. Under BMC 16.55.200 "any project that cannot adequately mitigate its
13 impacts to critical areas in the sequencing order of preferences in BMC 16.55.250 shall
14 be denied." Building and occupying homes at eye level with nesting Herons will disrupt
15 breeding and may lead the colony to abandon the site. Did the City err by failing to
16 honor the priority habitat and species protection given to Great Blue Herons?

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18 B. The City's critical area ordinance allows for habitat buffer averaging only
19 based on the best available science where "it will not reduce...habitat functions;...will
20 provide additional natural resource protection, such as buffer enhancement; and the
21 total area contained in the buffer area after averaging is no less than that which would
22 be contained within the standard buffer." BMC 16.55.490(F)(3). Here, buffer averaging
23 for Heron rookeries has not scientific support, will reduce the protection given nesting
24 pairs, and results in a net loss in buffer area. Did the City err by accepting buffer
25 averaging as mitigation for development within the protected critical area?
26

1 C. The City requires a developer's critical areas report to provide "a detailed
2 discussion of the direct and indirect potential impacts on habitat by the project, including
3 potential impacts to water quality; a discussion of measures, including avoidance,
4 minimization, and mitigation, proposed to preserve existing habitats and restore any
5 habitat that was degraded prior to the current proposed land use activity and to be
6 conducted in accordance with mitigation sequencing; and a discussion of ongoing
7 management practices that will protect habitat after the project site has been developed,
8 including proposed monitoring and maintenance programs." BMC 16.55.480(C). The
9 Report in this case has only a cursory discussion of the direct and potential impacts of
10 development and an unsupported assertion that work in the critical area will not affect
11 the Heron Colony. Did the City err by not requiring a more detailed scientific work
12 before reviewing the permit request?
13

14 II. Statement Of Facts.

15 This appeal concerns Heronwood Cluster Plat Alteration and Lot Line
16 Adjustment, a short plat expanding the developed lot at 22 Shorewood Drive (Lot A),
17 creating two residential lots (Lots B and D) and dedicated open space (Lot C). (Plat Map
18 attached as Exhibit A to Critical Areas Permit: Findings and Decision Type I; CAP2018-
19 0059). The 197-foot buffer zone protecting the core area of the Heron Colony overlaps
20 Lots C and D, and may, depending on the location of this year's breeding pairs, overlap
21 Lot B. By requesting a critical areas permit for the Cluster Plat, the Applicant concedes
22 that the proposed development occurs on or adjacent to protected critical areas.
23

24 On November 27, 2018, the Applicant, Ali Taysi with AVT Planning, submitted
25 applications for a plat alteration, lot line adjustment, and critical areas permit. Because
26

1 this is a short plat, the proposal is exempt under SEPA and has not had environmental
2 review under the statute. The Applicant did not request consolidated review, and City
3 staff addressed the critical areas permit first.

4 On March 27, 2019, the City's Planning and Community Development
5 Department approved the critical areas permit. (Findings and Decision Type I;
6 CAP2018-0059). The City premised its decision on the ability of the Heron Colony to
7 tolerate additional human disturbance during construction and afterwards. First, it noted
8 the Colony's survival during the 2013-2015 construction of secondary clarifier at the
9 Post Point Wastewater Treatment Plant.
10

11 During the October 2013-January 2015 construction period, the contractor
12 avoided work in the 100-foot buffer during the nesting season. However,
13 outside of the nesting season, the unavoidable work occurred in the no-
14 entry buffer, and mitigation followed (EXHIBIT J). It was anticipated that
15 even with temporary and permanent mitigation measures employed that
16 the heron colony would decline, but that did not happen. After two years of
17 construction, and after continued operation, the number of active nests
18 increased, as noted by Nahkeeta in subsequent annual reports (EXHIBIT
19 K).

20 (Findings and Decision ¶ 30 at 5).

21 Second, the City noted that the Heron Colony has so far tolerated the noise and
22 disturbance of its urban nesting site.
23

24 This colony has tolerated noise and visual disturbances from frequent train
25 traffic less than 500 feet away, the operation (and two-year expansion) of
26 the PPWTP, the annual Ski-to-Sea event less than 900 feet away, the dog
park and trail below and east of the colony, and residential uses upslope
and south of the colony, in addition to other stressors.

(Findings and Decision ¶ 32 at 5). The City concluded that with mitigation conditions
similar to those on expansion of the Wastewater Treatment Plant, the Colony will not

1 suffer from residential development in and near the protective buffer. (Findings and
2 Conclusion ¶ 42 at 6).

3 Jamie Donaldson, a Fairhaven resident and member of the local Audubon
4 Society, filed this timely appeal from the City's approval. On July 29, 2019, the Hearing
5 Examiner will hold an open record hearing on the appeal. This Pre-Hearing Brief
6 provides an outline to the issues Ms. Donaldson intends to raise at the Hearing.

7 **III. The City Violated Its Critical Areas Ordinance By Granting The Permit.**

8 The City's Critical Areas Ordinance, BMC Ch. 16.55, protects valuable wildlife
9 habitat from further destruction and degradation. It is the City's commitment to
10 protecting endangered and priority species from the unrelenting pressure to develop
11 more land.
12

13 Critical areas provide a variety of valuable and beneficial biological and
14 physical functions that benefit the city and its residents, and/or may pose a
15 threat to human safety or to public and private property. The beneficial
16 functions and values provided by critical areas include, but are not limited
17 to, water quality protection and enhancement, fish and wildlife habitat,
18 food chain support, flood storage, conveyance and attenuation of flood
waters, ground water recharge and discharge, erosion control, wave
attenuation, protection from hazards, historical, archaeological, and
aesthetic value protection, and recreation.

19 BMC 16.55.010. For this to be more than an empty promise, the City must stop making
20 compromises that degrade habitat incrementally, but permanently. This appeal holds
21 the City to account for protecting the only nesting site in Bellingham for Great Blue
22 Herons, a priority species.

23 **A. Increased Human Disturbance Harms The Colony**

24 By allowing further destruction of protected Heron habitat, the City has violated
25 its critical areas ordinance in at least three ways. First, even with mitigation,
26

1 constructing homes at eye-level with Heron nests will threaten the colony. The City
2 acknowledges that Herons are a priority species, deserving of special protection.

3 State priority habitats and areas associated with state priority species are
4 considered to be priorities for conservation and management. Priority
5 species require protective measures for their perpetuation due to their
6 population status, sensitivity to habitat alteration, and/or recreational,
7 commercial, or tribal importance. Priority habitats are those habitat types
8 or elements with unique or significant value to a diverse assemblage of
9 species. A priority habitat may consist of a unique vegetation type or
10 dominant plant species, a described successional stage, or a specific
11 structural element. Priority habitats and species (PHS) are identified and
12 listed by the State Department of Fish and Wildlife.

13 BMC 16.55.470.

14 Under the Department of Fish and Wildlife management recommendations, the
15 City should work to reduce human interference and disturbance, not increase it.

16 Great Blue Herons are highly vulnerable to human disturbance, predation,
17 and competition for nesting habitat. Their habit of nesting in large groups
18 makes herons especially susceptible to these types of impacts. A single
19 event involving human disturbance can lead an entire colony to terminate
20 a nesting attempt. Because herons breed in colonies of up to 500 nests,
21 early termination of even one breeding attempt can lead to a considerable
22 loss of offspring.

23 (Azzerad, Jeffrey, Management Recommendations for Washington's Priority Habitats
24 and Species at 1 (March 2012)). One leaf blower whining at the wrong time could end
25 the Colony's breeding for the year, or worse, cause the Colony to abandon the site.

26 Disturbance is particularly dangerous for urban colonies that already tolerate
higher levels of intrusion.

We do not recommend any new activities that will lead to an increase in
the intensity of disturbance. An increase in intensity can occur when a new
activity is sited closer to a colony than that of existing activities. Increased
intensity can also happen when the magnitude of a proposed disturbance
is out of proportion to all existing disturbances located the same distance
from a colony. To illustrate this point, consider a colony where herons

1 have historically persisted where the footprint of the closest home is
2 60meters from the colony. If a new home is sited 30 meters away, this
3 would constitute an increase in intensity because the new home's
4 influence on the colony would be greater than that of the existing home.
5 Other ways of increasing the intensity of disturbance include upzoning or
6 changing or converting to a more intensive land use practice.

7 (Azzerad, Management Recommendations at 11). Here, the Heronwood Cluster Plat
8 would build two new homes in direct line of sight with existing nests. No mitigation can
9 prevent this new residential development from increasing the intensity of human
10 disturbance.

11 B. Buffer Averaging Will Harm The Colony

12 Second, the City relies on an unproven and unscientific technique – buffer
13 averaging – to allow the Applicant to squeeze more developable land out of the critical
14 areas. The City uses buffer averaging successfully with wetlands, but the concept does
15 not translate to critical habitat like buffers around Heron nests. The Applicant's
16 proposed buffer averaging would replace vital areas next to and in sight of existing
17 nests and replace it with buffer further away. This is the antithesis of protection.

18 In an email to Ms. Donaldson, Mr. Azzerad, the author of the Heron Management
19 guidelines, acknowledged the lack of scientific support for this move.

20 I know buffer averaging is used in some county and city critical area
21 ordinances (specifically for riparian areas), but I'm not aware of the
22 ecological validity for using that technique (particularly along sensitive
23 heron colonies). As for great blue heron management, the use of buffer
24 averaging to develop within the buffers recommended in PHS Great Blue
25 Heron could certainly have negative impacts to the colony.

26 (4/8/19 Azzerad Email to Jamie Donaldson). The Applicant's biologist, a wetlands
specialist, proposed buffer averaging without acknowledging the unique features of a

1 Heron colony. (Habitat Conservation Area Report & Mitigation Plan at 13; Exhibit M to
2 Findings and Conclusions).

3 Under BMC 16.55.490, "the director may allow the recommended habitat area
4 buffer width to be reduced in accordance with a critical area report and the best
5 available science." The best available science does not support buffer averaging in
6 general, or as applied here.

7 C. The Applicant's Critical Areas Report Is Inadequate.

8 To justify development within an environmentally sensitive area, the Applicant
9 must provide a detailed Critical Areas Report assessing the potential environmental
10 damage. BMC 16.55.480. This includes a habitat assessment.
11

12 A habitat assessment is an investigation of the project area to evaluate the
13 potential presence or absence of designated critical fish or wildlife species
14 or habitat. A critical area report for a habitat conservation area shall
15 contain an assessment of habitats including the following site- and
16 proposal-related information at a minimum:

- 17 1. Detailed description of vegetation on and adjacent to the project
18 area and its associated buffer;
- 19 2. Identification of any species of local importance, priority species,
20 or endangered, threatened, sensitive, or candidate species that have a
21 primary association with habitat on or adjacent to the project area, and
22 assessment of potential project impacts to the use of the site by the
23 species;
- 24 3. A discussion of any federal, state, or local special management
25 recommendations, including Washington Department of Fish and Wildlife
26 habitat management recommendations, that have been developed for
species or habitats located on or adjacent to the project area;
4. A detailed discussion of the direct and indirect potential impacts
on habitat by the project, including potential impacts to water quality;
5. A discussion of measures, including avoidance, minimization,
and mitigation, proposed to preserve existing habitats and restore any
habitat that was degraded prior to the current proposed land use activity
and to be conducted in accordance with mitigation sequencing (BMC
16.55.250); and

1 6. A discussion of ongoing management practices that will protect
2 habitat after the project site has been developed, including proposed
3 monitoring and maintenance programs.

4 BMC 16.55.480(C).

5 This assessment takes on greater significance for short plats, like this cluster
6 plat, that are categorically exempt from SEPA. The sole environmental review in the
7 Heronwood record is the 22-page Habitat Conservation Area Report, which the
8 Applicant submitted.

9 The City erred by relying on the Report as proof that the development will not
10 cause damage to the Heron Colony. Instead, the City should have requested input from
11 its own expert, Anne Eissinger, and the Department of Fish and Wildlife's, Jeff Azzerad.
12 The City in its critical areas ordinance promises to protect priority species with the best
13 available science: "current scientific information used in the process to designate,
14 protect, or restore critical areas, that is derived from a valid scientific process as defined
15 by WAC 365-195-900 through 365-195-925." That did not occur in this case.

16 Furthermore, where the best available science is inconclusive, the City must
17 protect habitat first rather than agree to compromises that increase the development
18 potential of critical areas.

19 Where there is an absence of valid scientific information or incomplete
20 scientific information relating to a critical area leading to uncertainty about
21 the risk to critical area function of permitting an alteration of or impact to
22 the critical area, the director shall take a "precautionary approach," that
23 strictly limits development and land use activities until the uncertainty is
24 sufficiently resolved.

25 BMC 16.55.180(D). The City has taken the opposite approach, permitting development
26 unless scientific evidence specifically forbids it.

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CONCLUSION

We did not destroy the environment overnight. Instead, steady development over 150 years has led to collapsing salmon runs, endangered species, and the lack of wildlife habitat. To end the damage, we must stop the incremental compromises that favor development over protecting critical areas. This case illustrates the problem. The City has accepted various technical compromises with Applicant's assurance that nothing bad will happen to the nearby Heron colony. But the City has committed to protect the Herons, even when it means holding firm to the City's environmental regulations.

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Appellant Jamie Donaldson respectfully requests the Hearing Examiner to enforce the unambiguous terms of the critical areas ordinance and reverse the City's decision to grant Applicant a critical areas permit.

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Submitted this 15th day of July, 2019.

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BURI FUNSTON MUMFORD & FURLONG, PLLC



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Philip J. Buri, WSBA 17637
Counsel for Jamie Donaldson

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington, that on the date stated below, I mailed or caused delivery of Appellant's Memorandum in Support of Motion to Intervene to:

25
26

Jon Sitkin
Chmelik, Sitkin & Davis

Appellant's Pre-Hearing Brief -- 10

**BURI FUNSTON
MUMFORD FURLONG**
ATTORNEYS AT LAW

1601 F Street
Bellingham, Washington 98225
P 360-752-1500 F 360-752-1502

1 1500 Railroad Ave.
2 Bellingham, WA 98225
3 Jsitkin@Chmelik.com
4 Kbarnhill@Chmelik.com

5 Ali Taysi
6 AVT Consulting
7 1708 F St.
8 Bellingham, WA 98225
9 ali@avtplanning.com

10 Robert A. Kaye
11 North Cascades Audubon Society
12 PO Box 5805
13 Bellingham, WA 98227
14 rkaye@northcascadesaudubon.org

15 James Erb
16 City of Bellingham
17 210 Lottie St.
18 Bellingham, WA 98225
19 jeerb@cob.org
20 ahenshaw@cob.org

21 DATED this 15 day of July, 2019.

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23 Philip Buri